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No. 84-1321

In The

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

REPLY TO RESPONDENT'S RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. McGRANE
Assistant Attorney General

March 26, 1985

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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I. THE PANEL OPINION ON ITS FACE IS NOT LIMITED TO "THREAT TO TESTIFY" CASES.

Notwithstanding observations in Chief Judge Lay's solo concurring opinion denying rehearing en banc, the opinion of the panel, especially the right to testify holding, does not narrowly rest on any alleged "threat" by Whiteside's attorney to testify against him. *Whiteside v. Scurr,* 744 F.2d 1323, 1329 (8th Cir. 1984). It is thus not surprising that currently circulating advance sheets de-

scribe the panel opinion in *Whiteside* as holding that a "lawyer may not disclose that client is about to commit perjury." *See* "Recent Federal Cases," 360 N.W.2d No. 3 (Feb. 19, 1985) at XL.

The Respondent himself does not disagree with the broad characterization of the case in the advance sheets. *See* Resistance at 8. Moreover, the Respondent does not see the "threat to testify," as critical or essential to the outcome of the case.[1] Resistance at 5 n.3.

II. CONTRARY TO THE RESPONDENT'S VIEW, COURTS HAVE NOT "IN ALMOST ALL CASES" ENDORSED A BROAD RULE THAT A CRIMINAL DEFENSE ATTORNEY MAY NOT DISCLOSE A CLIENT'S PERJURY PLAN TO THE COURT.

The Respondent declares that statements in the ABA/BNA Manual on Professional Conduct that the majority of jurisdictions approve disclosure of planned client perjury cases is simply wrong as applied to criminal cases. He further contends that "in almost all cases" where the client perjury issue has arisen, the courts have stated that the right to counsel is violated when the contents of confidential attorney-client conversations are disclosed. Resistance at 6-7.

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[1]Of course, Petitioner still challenges the de novo appellate finding that Whiteside's attorney actually threatened to testify against him. While the Petitioner did not discuss the issue in briefing before the Court of Appeals, there has been no waiver for failure to attack a characterization of facts that was not accepted by any state post conviction court or by the federal district court and was embraced for the first time in the Court of Appeals.

The Respondent misreads a key case and ignores important decisions cited by the treatise. For instance, in *United States, ex rel. Wilcox v. Johnson,* 555 F.2d 115 (3rd Cir. 1977), a case cited by Respondent in his attack on the ABA/BNA Manual, the Court simply stated that if an attorney told the trial judge that his client planned to commit perjury *"without possessing a firm factual basis for that belief,"* he would be violating the duty imposed upon him as defense counsel (emphasis added). 555 F.2d at 122. In this case, however, Whiteside told his attorney flat out that he intended to commit perjury on the stand. "If I don't say I saw a gun," Whiteside told his lawyer, "I'm dead." (A. 85)

The Respondent also ignores *People v. Lewis,* 75 Ill. App. 560, 393 N.E.2d 1380, 1384 (1979) and *State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140-1 (1970), cases accurately cited by the ABA/BNA treatise to support its view that in a majority of jurisdictions, disclosure of client perjury to the court is a reasonable remedial measure in criminal cases.

III. THE POSSIBILITY OF PROSECUTION FOR PERJURY OR ENHANCED PUNISHMENT DOES NOT ADEQUATELY VINDICATE THE STATE'S INTEREST IN PROTECTING THE INTEGRITY OF THE FACT FINDING PROCESS IN CRIMINAL TRIALS.

The Respondent implies that the State has adequate sanctions to protect the courts from client perjury, noting that a criminal defendant may be prosecuted for perjury or receive enhanced punishment as a result of perjured testimony. Resistance at 9. These sanctions, however, cannot be expected to deter perjury in murder cases where the defendant faces a possibility of lifetime imprisonment as in this case or, in many states, capital punishment.

CONCLUSION

For all the above reasons, and for the reasons stated in our Petition, the Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals in this case.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. MCGRANE
Assistant Attorney General

*Counsel of Record